INITIAL STATEMENT OF REASONS

ADOPT SECTION 12903, *NOTICES OF VIOLATION*
TITLE 22, DIVISION 2, CALIFORNIA CODE OF REGULATIONS

The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65 (hereinafter referred to as "the Act"), requires businesses to provide clear and reasonable warnings prior to knowingly and intentionally exposing individuals to chemicals that have been listed by the State as known to cause cancer or reproductive toxicity [Health and Safety Code Section 25249.6]. The Act also prohibits businesses from knowingly discharging listed chemicals into sources of drinking water [Health and Safety Code Section 25249.5].

Exemptions from the warning requirement and the discharge prohibition are provided in the Act. Warnings are not required when the business responsible for the exposure to a listed chemical can show that the exposure occurs at a level that poses no significant risk of cancer (defined in regulation as a risk not exceeding one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime), or that does not exceed the "no observable effect level" divided by 1,000 for reproductive toxicants.

Necessity for the proposed regulation

Violations of either the warning requirement or the discharge prohibition are enforced through civil lawsuits filed by the Attorney General, by district attorneys, by specified city attorneys, or by any person acting in the public interest [Health and Safety Code Section 25249.7]. The Act allows private persons to file civil actions to enforce its provisions, but only under the following circumstances:

> (d)Actions pursuant to this section may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice of the violation which is the subject of the action to the Attorney General and the district attorney and any city attorney in whose jurisdiction the violation is alleged to occur and to the alleged violator, and (2) neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against such violation. [Health and Safety Code section 25249.7; emphasis added.]

Thus, the statute does not permit the citizen merely to provide notice of its intent to sue. Instead, the citizen must provide notice of "the violation which is the subject of the action." While this term is not specifically defined, it mandates two things: first, that the actual violation be described in the notice in some way, and second, that the subject of the action is then limited to the violation for which notice was given. If a "violation" was not included in the notice, it cannot be part of the action.

Accordingly, the content, manner and service, and time of service have substantial legal effects on the public, potential private plaintiffs, regulated entities, and enforcement agencies. Because the statute provides relatively little definition of the notice requirements, there is a need for guidance on these matters. In the absence of further guidance, substantial controversies have arisen in enforcement litigation concerning the nature of these requirements.

Proposition 65's notice provision is modeled generally after similar "citizen suit/60-day notice" provisions of certain federal environmental laws, such as the Clean Water Act. (See 33 U.S.C. § 1365(b)(1)(A).) In a recent appellate court examination of the notice issue, the Third Circuit in Public Interest Group of New Jersey v. Hercules, Inc., 1995 U.S. App. LEXIS 6619 (3rd Cir., March 31, 1995), described the function of the Clean Water Act notice as follows:

> In deciding whether to initiate an enforcement action, the EPA and the state must be provided with enough information to enable them intelligently to decide whether to do so. At the same time, the alleged violator must be provided with enough information to be able to bring itself into compliance. We will judge the sufficiency of the plaintiffs' 60-day notice letter in terms of whether it accomplishes these purposes. (Id., at 11.)

Thus, the first focus of a citizen suit notice is to enable the prosecutor "intelligently" to decide whether to file suit. Where a notice provides no real description of the claim it cannot perform that function. Typically, federal agencies administering statutes with similar sixty-day notice provisions have adopted regulations specifying the required content of the notices (Clean Air Act: 40 CFR §§ 5 4-54.3; Clean Water Act, 40 CFR §§ 135-135.1; Safe Drinking Water Act: 40 CFR §§ 135.10-135.13; Toxic Substances Control Act: 40 CFR §§ 702.60-702.62; Resource Conservation and Recovery Act: 40 CFR § 254; Surface Mining Control and Reclamation Act: 40 CFR § 700.13).

Second, the notice allows the defendant an opportunity to cure the violation. Under Proposition 65, penalties of up to $2,500 per day per violation are provided. Once informed of the violation, the defendant can bring the violation to a halt, and at least prevent the accrual of any further liability for penalties. While this would not by itself necessarily prevent a civil action, since a plaintiff may sue for penalties for past violations, the limitation of continuing liability nonetheless is quite significant.

Finally, it is critical to understand that under Proposition 65, the citizen plaintiff obtains the right to proceed "in the public interest." It also obtains the right to seek civil penalties, 75% of which would go to the state, and 25% to the plaintiff. Such influence over whether or not penalties will be collected for the public treasury is not to be taken lightly. As a condition precedent to establishing a citizen's right to proceed in the public interest on that matter, and to collect funds for the public treasury, the notice requirement should not be dismissed as a mere technicality.

As a general matter, any notice "is directed to someone who is to act or refrain from acting in consequence of the information contained in the notice." Bird v. McGuire (1963) 216 Cal.App.2d 702, 713.) As another court stated, "Notices, like that herein involved, are not

designed nor purposed as mere scraps of paper nor empty formalities." (Gianni v. City of San (1961) 194 Cal.App.2d 56, 63.) Thus, failure to give some reasonable effect to the notice requirement not only would be contrary to the wording of the statute, but contrary to the principles of notice established in a wide variety of contexts.

These provisions are important not only in enabling law enforcement officials to investigate a notice, but in defining the scope of the private person's right to sue under the statute. Since the notice must identify "the violation which is the subject of the action," other violations that are not adequately described in the notice cannot properly be a part of the private action. It has been suggested that this requirement could lead to piecemeal litigation, as a private person identifies different categories of products in violation of the law, and provides successive sixty-day notices. This, however, is a necessary consequence of the letter and purpose of the citizen suit provision, which is to allow private persons to identify particular violations, provide law enforcement authorities with an opportunity to prosecute them, and to bring actions only where law enforcement authorities do not do so. Private parties are not granted the unlimited right to prosecute violations that is granted to law enforcement authorities, and the notice provision reflects this.

Accordingly, the Office of Environmental Health Hazard Assessment (OEHHA), as lead agency for implementing Proposition 65, is proposing to adopt Section 12903 to specify the requirements for sixty-day notices in order to assure that such notices actually further the purposes described above.

Section 12903

Subsection (a). General.

Subsection (a) will provide that a notice under the statute is a notice meeting the requirements of the proposed regulation, and that actions by private persons under the statute must be brought in compliance with these regulations. While many Proposition 65 regulations adopt a "safe harbor" format (i.e., conduct outside the scope of the regulations is not prohibited, it simply is not specifically authorized), Section 12903 is not a "safe harbor" regulation. A notice must comply with these regulations, or it does not confer upon a private person the authority to commence an action under Health and Safety Code section 25249.7(d).

Subsection (b). Contents of Notice.

Subsection (b) of Section 12903 sets forth requirements relating to the information that must be included in a notice.

Paragraph (b)(1). General Information.

Many notices are sent to businesses, particularly out-of-state businesses, that are not familiar with the requirements of this law. The party giving the notice may not describe, or accurately describe, those requirements. Accordingly, it was determined that a concise summary should be provided

to the alleged violator. An earlier draft of the proposed regulatory language which was circulated informally specified the contents of this summary, and required it to be included in the notice. Based on comments concerning that proposal, it was concluded that such a summary should be presented in

a way that makes clear that it constitutes the lead agency's summary of the statute, not that of the private party.

The text of OEHHA's summary appears as Appendix A to the proposed regulation. The summary is intended only to provide general information to the lay person about the provisions of the statute, and does not represent an interpretation of the law.

Paragraph (b)(2). Description of Violation.

Experience over the last several years has shown that many notices do not describe the nature of the alleged violation in an intelligible manner. This makes it difficult for public prosecutors to evaluate the merit and significance of the alleged violation. In addition, if a civil action is filed based on such a notice, a controversy then exists concerning the proper scope of the suit. In a number of instances, private plaintiffs have sought through discovery or other procedures to expand the scope of the civil action significantly beyond the scope that one would reasonably infer from the notice. This also makes it difficult or impossible for the alleged violator to cure any violation prior to litigation, thereby impeding the achievement of the goals of the statute through quick compliance.

On the other hand, some alleged violators have demanded that the notice include the specific evidence by which the violation would be proven and evidence negating affirmative defenses that might be raised by the alleged violator in litigation. While such information is useful, the production of such evidence does not appear to be required by the operative statutory phrase, i.e., "notice of the violation which is the subject of the action." Thus, the proposed regulation simply provides that the notice "shall provide adequate information from which to allow the recipient to assess the nature of the alleged violation," and specifies the information needed to comply with that standard.

The information requirements set forth in subsection (b) are intended to ensure that notices provide adequate information necessary for their recipients to evaluate the nature and scope of the alleged violation.

Subparagraph (b)(2)(A) sets forth required elements of all notices, as follows:

(i). *name, address, and telephone number of the noticing individual or a responsible individual within the noticing entity and the name of the entity:* Identification of the party giving the notice is needed to give the receiving parties an opportunity to contact the noticing party to resolve the issues raised in the notice and to identify who will be entitled to pursue a civil action.

(ii). *name of the alleged violator(s):* Identification of the alleged violator is basic information necessary to allow any evaluation of the alleged violation. In addition, this

assures that any civil action will be limited to those parties identified in the notice.

In some instances, a single notice may identify as many as 50 or 100 alleged violators. This format may be convenient where the different violators have committed basically the same type of violation, which can be described in a single notice. The proposed regulation does not preclude the use of these types of notices, nor does it require a cup or industry-wide notice. A person may provide separate notices to different violators concerning the same type of violation, as long as each individual notice contains all information required by the regulation.

(iii). *the approximate time period during which the violation is alleged to have occurred*: This information is important to allow investigation of the facts and analysis of the overall scope and importance of the alleged violation. This includes determining whether the chemical involved in the alleged violation is in fact subject to the requirements of the Act at the time period in question, or is exempt because the statutory grace period had not expired.

(iv). *the name of each listed substance involved in the alleged violation:* The chemicals subject to the Act are determined pursuant to specific standards set in the Act (Health and Safety Code Section 25249.8), and published in the *California Regulatory Notice Register* and the California Code of Regulations (see 22 CCR Section 12000.) Nearly 600 different chemicals have been placed on this list to date, at different times since 1987. Existing regulations provide guidance for determining levels of exposure to listed chemicals which are exempt from the Act (i.e., levels which pose "no significant risk' of cancer, or which represent the "no observable effect level" divided by 1,000 for reproductive toxicants). The regulations also specify levels of exposure to particular chemicals that are exempt from the Act (22 CCR Section 12701-12711, 12801-12805).

A violation does not consist of exposure to toxic chemicals in general, but of exposure to a particular chemical on the Proposition 65 list. Because of their different properties, different chemicals raise very different issues in determining whether there is a violation. For example:

- Some chemicals are intended constituents present at up to 50% of a product by volume; others are "trace contaminants" present in concentrations measured in parts per billion, and which are found only through sophisticated analytical methods;

- The chemicals have a wide range of potencies. Exposures to toluene at levels not exceeding 7,000 micrograms (inhaled) per day are deemed to be exempt from the Act, while exposures to "dioxin" (2,3,7,8-tetrachlorodibenzodioxin) must be below 0.000005 microgram (5 one-millionths of a microgram) per day in order to be deemed to be exempt;

- Some chemicals have been on the list since February 27, 1987, while others were added as recently as May 1, 1996.

> In short, knowledge of the particular chemicals involved in the alleged violation is critical to a public agency's ability to intelligently act on the notice. Moreover, if the citizen does not know whether a listed chemical is involved in an exposure or a discharge, it is hardly in a position to charge the defendant with violating the statute.

Subparagraph (b)(2)(B) specifies information required as part of notices alleging a violation of Health and Safety Code section 25249.5, the prohibition against discharges into drinking water sources. Where the notice alleges a violation of the "discharge" requirement, it should identify the "source of drinking water" into which a listed chemical is being discharged, to enable investigation. The requirement encompasses both current or potential sources.

Subparagraph (b)(2)(C) specifies that all notices alleging a violation of Health and Safety Code section 25249.6, the warning requirement, identify the route of exposure involved -- i.e., dermal contact, inhalation, or ingestion. Because the human body's ability to absorb different chemicals varies substantially by route of exposure, this is important information in investigating the potential merit of any claim.

Subparagraph (b)(2)(D) specifies that all notices alleging a violation of the Act for failure to warn about exposures from consumer products identify the product or service or category of product or service involved. This issue has been one of the most problematic in evaluating notices.

Most notices adequately describe the products involved in the alleged violation, e.g., "ceramic dishes" or "spray paint. " In some instances, however, the notices describe the products that are to be the subject of the action only in very broad terms, such as "various aerosol, paint, adhesive and/or automotive products, including but not limited..." or "various chemical products, sold in bulk or as finished products(.)" This reference to the products is totally inadequate to describe the nature of the violation that is claimed. The descriptions are so general that they would appear to encompass s virtually any product that might be made by certain companies. To notify the Attorney General of "the violation which is the subject of the action" as required by the Act, there must be some description of those products, otherwise the notice simply declares a general intent to sue this defendant under this law, which does not satisfy the statute.

This is not to suggest that a citizen must describe the product by some obscure product identification number, or describe spray paints by every shade. Clearly, it would be sufficient simply to say "aerosol spray paint," "car wax" or "paint thinner." Such a description would at least identify the category of products that will be the subject of the action, and would enable the public agency to focus the investigation.

In some instances, notices use the phrase "including but not limited to" with respect to both the chemicals and the products involved. Clearly, such expansive language provides no additional information concerning the claimed violation, and under the proposed regulation, would not be considered in any way to expand the violation for which proper notice has been given.

For each product or category of product identified, the specific chemical also must be identified, pursuant to the requirements of subparagraph (b)(2)(A)(iv). In some instances, notices have been provided that identify a long list of chemicals, and a number of products, without indicating which chemicals are alleged to be present in which products. This completely defeats the purpose of identifying the chemicals in question, and would not be permitted under the proposed regulation.

Subparagraph (b)(2)(E) specifies that all notices alleging a violation of the Act for failure to warn about occupational exposures provide the following information:

(i) *the general geographic location of the unlawful exposure to employees, or where the exposure occurs at many locations, a description of the occupation or type of task performed by the exposed persons:* Most occupational exposures are alleged to take place at a given worksite, i.e., a factory or office, and the regulation would require that this location be identified. Some exposures, however, might be alleged to occur to a given category of workers at a variety of locations, e.g., utility pole technicians, so the regulation would allow identification in that manner where appropriate.

(ii) *where the alleged violators include the manufacturer or distributor of the chemical or products causing the exposure, identification of products in the same manner as set forth for consumer product exposures:* In some instances, the occupational exposure is caused by the use of a chemical or other product in the workplace. In those instances, the provider of the chemical or product should be identified, as should the product in question. The same information requirements for notices involving consumer products in subparagraph (b)(2)(D) apply.

Subparagraph (b)(2)(F) specifies that all notices alleging a violation of the Act for failure to warn about environmental exposures identify the general geographic location of the source of the unlawful exposure, and whether the unlawful exposure occurs beyond the property owned or controlled by the alleged violators. For environmental exposures, identification of the general location of the source of the exposure is sufficient. Some alleged environmental exposures occur to persons within the confines of the premises of the facility in question, while others are alleged to occur to persons on premises outside the facility. Since the manner of providing warnings to these different persons differs substantially, this information is needed to evaluate the allegation, and the regulation requires that the notice specify whether the exposure occurs beyond the property owned or controlled by the alleged violators.

Paragraph (b)(3)

Some notices allege violations that involve two or more of the following categories of exposures: environmental, occupational, and consumer product exposures. This paragraph clarifies that, where more than one category of violations is alleged, the notice requirements for each applicable category must be satisfied.

Paragraph (b)(4)

As noted above (see discussion on paragraph (b)(2) on page 4, the proposed regulation is not intended to require that highly technical information be provided, to require disclosure of the evidence by which a violation will be proven, or otherwise to turn the notice requirement into a trap for the unwary. Accordingly, paragraph (b)(4) specifies that the following information need not be provided because, in OEHHA's view, they are not needed to adequately identify the nature of the alleged violation:

- the specific retail outlet or time or date at which the product which is the subject of the notice was purchased;
- the level of exposure to the chemical in question;
- the specific admissible evidence by which the person will attempt to prove the violation;
- the UPC number, SKU number, model or design number or stock number or more specific identification for notices involving consumer products; or
- the lot, block or other legal description of the property in question, for notices involving geographic areas.

While the above information may be helpful and could be provided in an effort to resolve the matter prior to litigation, it is not legally mandated.

Subsection (c). Service of Notice.

The statute provides no guidance concerning the manner of service. However, since the notice has important legal effects, and disputes have arisen concerning the fact of service, it is necessary to adopt regulations that specify the manner of service.

The proposed regulation provides that notices may be served by first class mail or in a manner which meets the provisions for service of a summons and complaint under the California Code of Civil Procedure.

In order that the parties receiving the notice can determine that the service requirements have been met, a service certificate is required. This should not be burdensome to persons giving notice, because ordinary prudence suggests that such documentation should be prepared in the event of a later dispute over the fact of service.

The provision in paragraph (c)(3) concerning the persons served is intended simply to track the statute. Two issues have arisen concerning these requirements. First, in some instances, parties have sued concerning sales of a consumer product throughout the entire state, while giving notice only to one or a few district attorneys. With respect to a consumer product, the "violation occurs" wherever the product is used in a manner that creates an exposure without a warning, or where it is purchased. Thus, a notice confers the right to sue under Proposition 65 only as to violations occurring within each county for which the district attorney was notified.

Second, the statute requires notice to "any city attorney in whose jurisdiction the violation is alleged to occur." In this context, the term "city attorney" means only those city attorneys specifically authorized to bring suits by Health and Safety Code section 25249.7(c), i.e., "any city attorney of a city having a population in excess of 750,000." Although the statute allows a “city prosecutor" to sue with the consent of the district attorney, the notice is required to be served only on a "city attorney," not any city prosecutor. Moreover, since only the specified city attorneys have an unqualified right to sue, there is no point in requiring service of the notice on other city attorneys who lack legal authority to take action on the notice. Since the district attorney will receive the notice, and the ability of other city prosecutors relies on the consent of the district attorney, notice to the district attorney satisfies the statute.

Subsection (d). Computation of Time.

The statute does not establish specific provisions for the computation of time. To provide greater certainty to all participants in the process, subsection (d) specifies that time is computed essentially as it would be in civil litigation.

First, it provides that the sixty days runs from the date of service as calculated under Code of Civil Procedure section 10 1 3, and in paragraph (d)(3), that the first and last day are calculated as provided under section 12 of the Code of Civil Procedure. Thus, where a notice is served by hand, the first day of the sixty day period is the next day. Where it is served by first class mad within the State of California, there is a five-day extension, an additional ten days within the United States, etc., as provided in the referenced code sections.

In some instances, the sixtieth day after service of the notice may fall on a legal holiday. To assure that the law enforcement agencies are not under any circumstances deprived of the full sixty-day period to determine whether to take action without any possibility of a citizen suit being filed first, the regulation (specifically paragraph (d)(2)), would extend the sixty-day period where the sixtieth day falls on a legal holiday. It is necessary to specify this because it is not clear that Code of Civil Procedure section 12a would apply here. That code section applies wherever "the last day for the performance of any act provided or required by law to be performed within a specified period of time" falls on a defined legal holiday. Under Proposition 65, the sixtieth day is not the last day on which a prosecutor may file suit; it is simply the final day of the waiting period before which a private party may sue. Indeed, a private suit would be barred any time the public prosecutor commenced an action first, even if it occurred substantially after the expiration of the sixty day period. To avoid any dispute over this issue, the regulation would provide that there is an extension wherever the sixtieth day is a legal holiday.

OEHHA notes that "legal holiday" under this provision is defined in a manner that includes all Saturdays, all Sundays and other specified holidays. It also defines holidays to include a day on which any government office is closed "insofar as the business of that office is concerned. " As applied to this situation, this would mean that any day upon which the office of the district attorney that files the suit, the office of the Attorney General, or the court in which the action is filed, are closed, is a legal holiday.

Appendix A

Subsection (b)(1) of the proposed regulation requires that general information regarding Proposition 65 in the form of an attachment entitled, "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary," accompany the notice. Appendix A provides the text of that attachment.

Appendix A provides basic information about Proposition 65 by summarizing the provisions of the statute, with references to certain provisions found in regulations (e.g., clarification on what constitutes a "clear and reasonable" warning, the definition of "no significant risk" and reference to information and procedural requirements governing notices of violations). This summary is intended to furnish the recipient of a notice with background information about the law that it is alleged to have violated.

Alternatives considered

The only alternative to the proposed regulation considered by OEHHA is not to adopt a regulation addressing notices of violation under Proposition 65. As discussed in the preceding sections, however, the need to establish clear, consistent requirements which such notices must meet to be considered acceptable is plainly indicated by what has been California's experience with actual notices that have been given by private parties. OEHHA has rejected the alternative of not adopting a regulation on this basis, along with the fact that the proposed regulation does not create any additional requirements that could result in an adverse economic impact on businesses.

Duplication or conflict with federal regulations

No federal regulation addresses the same issues as those addressed by the proposed regulation. Therefore, the proposed regulation does not unnecessarily duplicate or conflict with federal regulations addressing the same issue.